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In the

Supreme Court of the United States

Xu Liu and Xiaomei Yang,

Petitioners,

v.

Price Waterhouse LLP and
Computer Language Research, Inc.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

Brief of Amici Malla Pollack *et al.* Supporting Petition for Writ of Certiorari

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Interest of the Amici Curiae

Amici Malla Pollack, Ann Bartow, Ralph D. Clifford, Rod Dixon, and Eugene Quinn are law professors specializing in copyright and related subjects. Their only interest in this case is to assist the Court to properly interpret the statutes involved.[1]

Amicus HS&W Systems Consulting, Inc. is a small firm which has made its living as an independent software developer for approximately twenty years, often contracting to produce software for large corporations. HS&W is interested in maintaining its ability to deal fairly with its clients.

Summary of Argument

Certiorari is appropriate because the Seventh Circuit opinion misreads this Court's basic copyright precedent and the governing statutory provisions. Certiorari is appropriate now because the opinion destabilizes a leading sector of the economy. The Seventh Circuit opinion destroys one of the most delicate, complex compromises Congress inserted in the Copyright Act. Furthermore, because the decision is in tension with clear statutory language, interested parties cannot foresee which version of law will govern their disputes. This Court should act promptly to reassure the

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1. No counsel to a party in this case has authored this brief in whole or in part. The cost of preparation and submission of this brief has been paid in full by the listed *amici*. The institutional affiliations of the law professor *amici* are provided for identification purposes only. Law professor *amici* do not purport to represent the positions of their respective institutions.

copyright industries that the law will be settled quickly.

Summary of Facts

Petitioner Yang (a computer-programer) went to China as Price Waterhouse's agent. In that capacity, with the permission of Price Waterhouse, Yang arranged for a group of Chinese programmers to write computer code to speed up a pre-existing program in which Price Waterhouse held copyright. The result was a program containing both old and new elements ("the resulting program"). The Chinese programmers signed no writing what-so-ever giving Price Waterhouse copyright in their original code. Price Waterhouse purported to transfer copyright in the resulting program without permission from the Chinese programmers. To protect their interests, the Chinese programmers arranged for Petitioner Liu to apply for a United States copyright registration for their original code as embodied in the resulting program. The District Court found that Liu had infringed Price Waterhouse's copyright in the original computer program merely by filing the copyright registration application, but that Price Waterhouse had not violated the Chinese programmers' copyright, for the sole reason that they lacked any valid copyright interest. The Seventh Circuit affirmed. *Liu v. Price Waterhouse LLP*, 302 F.3d 749 (7th Cir. 2002).

Argument

In *Liu v. Price Waterhouse LLP*, 302 F.3d 749 (7th Cir. 2002), the Seventh Circuit vested copyright for a computer program in a business, even though that business had neither employed the human writers of the work nor contracted with the human writers of the work. This decision upsets a very delicate policy balance set by Congress in the

Copyright Act. Unfortunately, this opinion also has the power to destabilize an important sector of the United States economy because it undermines settled expectations resting on carefully drafted statutes. Additionally, the opinion endangers the viability of independent-contractor authors by placing their authorship rights under the total control of commissioning entities.

I. The Seventh Circuit Decision Misreads Statutes and Long Standing Precedent of This Court

The Seventh Circuit's decision is wrong. It both misreads the governing statute and overlooks this Court's long settled precedent.

First, the Seventh Circuit is not following the clear statutory text, even though statutory construction must start with the words chosen by Congress. *See, e.g., Dept. of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, ___, 122 S. Ct. 1230, 1233 (2002)(relying on "plain language of the statute."). Copyright may vest initially in a juridical person only if (i) that person is the employer of the human author, or, (ii) if that juridical person (a) has a contract signed by the human author, (b) the work was "specially commissioned," and (c) the work is within one of the categories listed in part (2) of the statutory definition of a work made for hire. 17 U.S.C. § 201 ("ownership of copyright"); *id.* at § 101 (definition of "work made for hire"). Otherwise, to acquire exclusive copyright, the juridical person must contract with the human author. *See* 17 U.S.C. § 204(a) (requiring written instrument signed by the transferring author). The Seventh Circuit does not purport to find that the derivative work at issue meets either of the works made for hire tests. Nor does the Seventh Circuit purport to find that the Chinese programers signed any written instrument transferring their copyright to Price Waterhouse. Yet the Seventh Circuit vests

exclusive rights in Price Waterhouse.

Second, the Seventh Circuit added limitations to those Congress placed in 17 U.S.C. § 103. "The subject matter of copyright as specified by section 102 includes . . . derivative works, but protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully." 17 U.S.C. § 103(a). Permission to use pre-existing material to create a derivative work does not have to be in a signed writing, unlike other portions of Title 17 where written, signed instruments are necessary, *see, e.g.*, 17 U.S.C. § 101 ("in a written instrument signed by them," from part (2) of the definition of "works made for hire"); *id.* at § 204(a)("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."). Yang acted in China as the agent of Price Waterhouse. *See Liu*, 302 F.3d at 753. Yang's verbal approval for creation of the derivative computer program is sufficient to allow that derivative work copyright protection under Title 17.[2] Liu, therefore, did not infringe by filing an application for copyright registration of the derivative work on behalf of the Chinese programmers (the human authors). *See Stewart v. Abend*, 495 U.S. 207, 232 (1990) ("Congress simply intended that a derivative work author may not employ a copyrighted work without the author's permission, *although of course he can obtain copyright protection for his own original additions.*")

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2. Even if, *arguendo*, Yang overstepped her instructions, Price Waterhouse would be bound in this detail by her apparent authority. *See* Restatement (2d) Agency § 8.

(emphasis added).

Absent mutual permission, neither Liu nor Price Waterhouse may authorize use of the resulting program, which includes material covered by their respective copyrights. Section 103 not only denies Liu the power to grant anyone permission to use the Price Waterhouse material imbedded in the resulting program, it also denies Price Waterhouse the right to grant anyone permission to use the new authorship added by the Chinese programmers. Section 103(b) protects both authors.[3] The Seventh Circuit only recognized the protections given Price Waterhouse.

The Seventh Circuit's basic statutory error is to assume that copyright in the derivative work existed only at the pleasure of Price Waterhouse. Because Price Waterhouse has the power to limit licenses of the underlying work, the Seventh Circuit assumed that Price Waterhouse needed to affirmatively and explicitly approve copyright protection for the derivative work. *See Liu*, 302 F.3d at 754-55. Title 17, however, does not give the copyright holder of the underlying work quite that much power. Title 17 has no provision that gives Price Waterhouse the ability to destroy the Chinese programmers' copyright in the derivative work once Price Waterhouse agreed to that derivative work's creation. However, Price Waterhouse can totally destroy the market

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3. "(b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material." 17 U.S.C. § 103(b).

value of the derivative work by refusing to license the underlying work. This seems more than sufficient bargaining power to enable Price Waterhouse to negotiate a contract for use of the derivative work. Price Waterhouse, nevertheless, wants more; it wants to control the copyright in the derivative work without either hiring someone to author that work or negotiating a contract with the derivative work's human authors. Congress gave human authors more protection in the plain language of the Copyright Act. *Cf.* Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law* 7, Columbia Law School Public Law & Legal Theory Research Paper No. 03-51, *available at* <http://www.ssrn.com> (visited March 17, 2003) ("Much of copyright law in the United States and abroad makes sense only if one recognizes the centrality of the author, the human creator of the work.").

The Seventh Circuit's fundamental legal error is to overlook the teaching of *Wheaton v. Peters*, 33 U.S. 591 (1834). Copyright is not a common law concept which can be manipulated by the courts according to their equitable (mis)beliefs. Copyright in the United States is totally a creature of statute. *See Wheaton*, 33 U.S. at 663 (Copyright "does not exist at common law– it originated, if at all, under the acts of Congress."); *id.* at 662 ("[I]f the right of the complainants can be sustained, it must be sustained under the acts of Congress."). This cases does not merely start with the words of the statute, it ends with the words of the statute.

In sum, the Seventh Circuit's decision is incorrect. While this Court does not sit merely to correct errors, this error is sufficiently important to support immediate review.

II. The Seventh Circuit's Decision Is Sufficiently Important to Justify a Grant of Certiorari

A. The Seventh Circuit's Decision Substantially Undermines the United States' Economy

A healthy market requires firm rules. Therefore, "enhancing [the] predictability and certainty of copyright ownership" was "Congress' paramount goal" when drafting what became the 1976 Copyright Act. *See Community for Creative Non-Violence v. Reid* ("*CCNV*"), 490 U.S. 730, 749 (1989). Who can contract or invest without settled expectations? *See, e.g.* E.S. Browning & Gregory Zuckerman, *War Jitters Send Markets Down; Treasury Yields Hit 44-Year Low*, Wall St. J., March 11, 2003, at A1 ("[L]ingering anxiety about possible military action is paralyzing decision-making at U.S. corporations, postponing important spending moves, and holding back economic growth.").

Copyright rules are the bedrock for a growing section of the United States economy. "In 2001, the copyright industries accounted for more than five percent of the U.S. Gross Domestic Product, growing at twice the rate of the remainder of the U.S. economy. Internationally, the U.S. copyright industries foreign sales and exports led all major industry sectors." James E. Rogan, Under Secretary of Commerce for Intellectual Property & Director of the U.S. Patent & Tmk. Office, Remarks at the USPTO/U.S. Copyright Office Copyright Conference (April 25, 2002), *available at* <http://www.uspto.gov/web/offices/com/speeches /copyrightconf.htm> (visited March 3, 2003).

Furthermore, the losing plaintiffs, the Petitioners, represent an important segment of the population. A growing percentage of the United States work force is outside the once traditional full-time, long-term salaried employee structure.

Such "contingent workers" accounted for approximately 4% of the United States' work force between 1999 and 2001, including 8.6 million independent contractors. Bureau of Labor Statistics, U.S. Dept. of Labor, *Contingent and Alternative Employment Arrangements, February 2001*, at 1, *available at* <http://www.bls.gov/news.release/ conemp. nr0.htm> (visited March 9, 2003).[4] *See also, e.g.*, Susan N. Houseman, *Why Employers Use Flexible Staffing Arrangements: Evidence from an Establishment Survey* 9 (W.E. Upjohn Institute for Employment Research Working Paper No. 01-67; Oct. 2000) (reporting that employers expect to increase use of non-traditional work arrangements), *available at* <http://papers.ssrn.com> (visited March 9, 2003). Independent contractors, furthermore, are a quality resource. They "tend to be older, highly educated persons" often performing "professional specialty jobs." Bureau of Labor Statistics, *supra*, at 5. Independent contractors lack guaranteed salaries, they need to know how to protect the value of their work. The Seventh Circuit decision unexpectedly destroyed the contractual bedrock on which independent contractors build their financial futures.

On the other hand, a business, like Price Waterhouse, can always obtain complete copyright control of any needed work. All the business needs to do is to hire the human author as a bona fide employee. 17 U.S.C. § 101 ("A 'work made for hire' is – (1) a work prepared by an employee within the scope of his or her employment"). If the business chooses not to provide the human author with the security of

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4. Current figures may be much higher. The most recent survey was conducted over two years ago, in February 2001. *See* Census Bureau, Dept. of Commerce, Email to Pollack (March 10, 2003; on file with Pollack).

employment,[5] the business needs to obtain a contract from the human. This case, similarly to *CCNV*, interprets the Copyright Act to "leave[] the door open for hiring parties, who have failed to get a full assignment of copyright rights from independent contractors . . . to unilaterally obtain [exclusive] rights years after the work was completed . . .." *CCNV*, 490 U.S. at 750.

In summary, this case is sufficiently important to justify the Court's current attention.

B. The Seventh Circuit's Decision Changes Delicate Policy Balances Set by Congress

"Strict adherence to the language and structure" of a statute is "particularly appropriate" when the "statute is the result of a series of carefully crafted compromises." *See, e.g., CCNV*, 490 U.S. at 748 n.14 (1989) (citations omitted). *CCNV* explained the complexity, length, and delicacy of the negotiations leading to the 1976 Copyright Act's original work-for-hire provisions. *See CCNV*, 490 U.S. at 737-51.

The extreme delicacy of the balance was thunderously demonstrated when Congress modified the work made for hire definition in the conference committee version of the Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. 106-113. Title One (the Satellite Home Viewer Improvement Act of 1999), Section 1011 (Technical

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5. One leading reason businesses choose not to hire individuals is to side-step statutes regulating employee benefits and pension plans. *See, e.g.,* Houseman, *supra*, at 10-11. Only 72.5% of independent contractors have health insurance, compared to 83% of the traditional work force. *See* Bureau of Labor Statistics, *supra*, at 6 & Table 9.

Amendments), subsection e, added "as a sound recording" to the second part of the "work made for hire" definition. The accompanying Conference Report labeled the measure "a technical and clarifying change" which "shall not be deemed to imply that any sound recording or any other work would not otherwise qualify as a work made for hire in the absence of the amendment made by this subsection." H.R. 106-465, *as reprinted in* 154 Cong. Rec. H11796 (Nov. 9, 1999), *as available in* <http://thomas.loc.gov/> (congressional search engine).

A chorus of disapproval prompted a rapid and (remarkably) retrospective repeal. *See* Work Made for Hire and Copyright Corrections Act of 2000, Pub. L. 106-379. In addition to substantive objections, the lack of open process was roundly denounced. The 1999 amendment "caused some to criticize" the responsible congresspersons and staffers "as having indulged in unfair, deceptive, and sneaky behavior." *United States Copyright Office and Sound Recordings as Work[s] Made for Hire: Hearing before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 9 (May 25, 2000) (statement of Hon. Howard Coble, Subcomm. Chair, R., N.C.), , *available at* < http://commdocs.house.gov/ committees/ judiciary /hju65223>0.htm> (visited March 10, 2003). *See also id.* at 26 (statement of John Conyers, Jr. ranking minority member of subcomm., D. Mich.)("[T]here can be no disagreement that [the 1999 amendment] is controversial and that it was made in a totally-unrelated conference agreement dealing with satellite transmissions . . . There were no hearings, no markups, no consideration of any kind by the Members.").

Perhaps even more unusual than its retrospectivity, the 2000 removal of "sound recordings" also inserted a statutory construction warning in the text of the statute:

> In determining whether any work is eligible to be

considered a work made for hire under paragraph (2), neither the amendment contained in section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, nor the deletion of the words added by that amendment--

> (A) shall be considered or otherwise given any legal significance, or
>
> (B) shall be interpreted to indicate congressional approval or disapproval of, or acquiescence in, any judicial determination, by the courts or the Copyright Office. Paragraph (2) shall be interpreted as if both section 2(a)(1) of the Work Made For Hire and Copyright Corrections Act of 2000 and section 1011(d) of the Intellectual Property and Communications Omnibus Reform Act of 1999, as enacted by section 1000(a)(9) of Public Law 106-113, were never enacted, and without regard to any inaction or awareness by the Congress at any time of any judicial determinations.

17 U.S.C. § 101. Clearly, the balance of the work for hire provisions is exceptionally delicate. Otherwise, Congress would not have considered such warnings necessary.

The destabilizing power of *Liu v. Price Waterhouse* is much greater than that of the 1999 amendment. First, *Liu*'s scope is greater. That amendment impacted only persons involved in creating sound recordings. The Seventh Circuit's opinion impacts all independent contractors who author derivative works of any kind. Second, the legal authority of *Liu* is less clear. Statute is statute -- controlling authority regardless of the attention devoted to it by the enacting legislators. In contrast, a case from one federal appellate court, especially a case in extreme tension with statutory language, is only binding in litigation within that circuit. No

would-be independent-contractor author and no would-be commissioner of an independent-contractor author can be sure of the outcome in another United States jurisdiction. Furthermore, such a person cannot even be sure which circuit's case law will be determinative in a future dispute.

In sum, this destabilization of background rules deserves the Court's current attention.

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Conclusion

For all the reasons discussed above, the Court should grant a writ of certiorari and reverse the Seventh Circuit's decision.

Respectfully Submitted: March 24 2003,

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